Office Supreme Court, U.S.
FILED
JUN 12 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. [redacted] 100

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
(A) Proceedings in the District Court	3
(B) Facts Bearing on Count 1	4
(C) The Co-Conspirator's Evidence	7
(D) Facts Bearing on Counts 2 and 3	8
(E) Proceedings in the Court Below	8
Reasons for Granting the Writ	11
Conclusion	16
Appendix A—Opinion Below	A3
Appendix B—Judgment Below	A8
Appendix C—Statutes Involved	A9

AUTHORITIES.

Cases.

	Page
Achilli v. United States, 353 U. S. 373	13, 14, 15
Oliver v. United States, 202 F. 2d 521	13
United States v. Georga, 210 F. 2d 45	13

Statutes.

Internal Revenue Code of 1939:	
§ 145(b)	14
§ 894(b)(2)(C)	3
§ 3616(a)	13, 14, 15
Internal Revenue Code of 1954:	
§ 7207	3, 9, 14, 15, 16

Miscellaneous.

H. R. Rep. No. 1337, 83d Cong., 2d sess., p. A425	13
Sen. Rep. No. 1622, 83d Cong., 2d sess., p. 603	13
1 Wigmore, *Evidence* (3d ed. 1940) §§ 192-194	12

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No.

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HARRY J. ALKER, JR., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 15, 1958.

OPINION BELOW.

The opinion of the court of appeals (Appendix A hereto, pp. A3-A7, *infra*) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on May 15, 1958 (Appendix B hereto, p. A8, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Petitioner was indicted and tried on two indictments. The first, which charged him with conspiracy, was dismissed just before the case was submitted to the jury. The second charged three substantive offenses, on all of which he was convicted. On appeal he contended that the last two counts did not charge offenses; the Government stated that it "is agreeable that they be dismissed by the court and the sentence thereon vacated"; and this was done. Petitioner's conviction on the one count was affirmed.

The question presented is whether, in view of the closeness of the case on the single count which was sustained, and in view of the damaging nature of the counts that were abandoned on appeal, the resultant prejudice requires reversal for basic unfairness.

The question presented may be alternatively stated as follows:

Whether it is open to the prosecution to use at a trial, as vehicles for introducing evidence that is damaging to a defendant and results in a conviction, additional counts which on appeal it concedes did not state any offense.

STATUTES INVOLVED.

The statutes involved are set out in Appendix C hereto, pp. A9-A10, *infra*.

STATEMENT.

In view of the nature of the question presented, only the facts relevant thereto are set forth here.

(A) *Proceedings in the district court.* Petitioner, a lawyer, was tried on two indictments. Indictment No. 18,730 (3a-4a)[1] was in three counts. Count 1 alleged that petitioner violated § 894(b)(2)(C), I. R. C. 1939 (Appendix C hereto, *infra* p. A9), by wilfully attempting to evade and defeat the estate tax imposed upon the estate of Winfred S. Hurst, deceased, by filing and causing to be filed a false and fraudulent estate tax return wherein he stated that the cash on hand belonging to the decedent was $3,046.93, whereas he well knew that the correct sum of cash on hand was $38,046.93. Count 2 alleged that petitioner violated § 7207, I. R. C. 1954 (Appendix C hereto, *infra* p. A10), by submitting to delegates of the Secretary of the Treasury, on April 7, 1955, certain documents which he knew to be fraudulent and false as to material matters. Count 3 alleged that petitioner further violated § 7207, I. R. C. 1954, by delivering to a delegate of the Secretary of the Treasury, on April 29, 1955, statements and documents known by him to be fraudulent.

Indictment No. 18,731 alleged that petitioner conspired, in violation of the general conspiracy provision (18 U. S. C. § 371), with Horace S. Rhoads, who was also indicted, and with Eugene Carpenter, Sr., who was not indicted, to attempt to evade and defeat the estate tax imposed upon the estate of Winfred S. Hurst, deceased, by delivering to delegates of the Secretary

1. Figures with the suffix "a" refer to the Appendix filed by petitioner in the court below.

of the Treasury, certain documents known by the conspirators to be fraudulent and false in material matters, and to conceal material facts concerning matters within the jurisdiction of a department or agency of the United States.

Rhoads was tried on Indictment 18,731 at the same time that petitioner was tried on Indictments 18,730 and 18,731. Shortly after the conclusion of the prosecution's case in chief, Rhoads' motion for acquittal was granted (210a). At the close of all the evidence, the court granted petitioner's motion for acquittal with respect to the conspiracy indictment (248a).

Thereafter the substantive indictment, No. 18,730, was submitted to the jury, which returned a verdict of guilty on each of the three counts (300a).

Petitioner filed timely motions in arrest of judgment, for judgment of acquittal and for a new trial (302a-306a), which alleged (306a) that—

> "4. The court erred in permitting the evidence in support of counts Nos. 2 and 3 of the indictment to be considered by the jury because neither count sufficiently charges an offense against the United States, and defendant was prejudiced in having his guilt under count No. 1 considered together with his guilt under the defective counts."

This motion was denied (1a); a motion for reconsideration (307a) was similarly denied (2a); and petitioner was sentenced to six months' imprisonment on each count, the sentences to run concurrently, and to a fine of $8,000 on Count 1 and of $1,000 each on Counts 2 and 3 (301a, 308a).

(B) *Facts bearing on Count 1.* Count 1 charged an attempt to evade and defeat the estate tax imposed

on the Estate of Winfred S. Hurst, deceased, by filing, etc., an estate tax return in which petitioner, Hurst's executor (11a), "stated that the cash on hand belonging to said decedent was the sum of $3,046.93, whereas, as he then and there well knew, the correct sum of such cash on hand was $38,046.93, and upon which understated and unreported cash of $35,000, as the defendant then and there well knew, there was imposed by law and due and owing to the United States of America a tax of $9,904.91" (3a).

The proof on both sides under the foregoing allegations covered a wide range.

(i) One issue was whether, when the decedent's safe was opened in petitioner's presence and was found to contain seven packages of bills, each package consisted of $500 or of $5,000—an aggregate difference of $31,500.

Mrs. Roth—a close friend of the decedent (47a) and ultimately a legatee under his will (41a)—and her daughter Jane, also a legatee (54a), both testified that they were present, along with petitioner, the alleged co-conspirator Carpenter, and a secretary, when decedent's safe was opened shortly after his death (26a-38a, 52a-56a). Neither witness knew how much cash was taken out of the safe (50a-51a, 59a), but both testified that there were seven packages of bills (28a, 52a) and that petitioner said that there was $500 in each package (34a, 52a). Both were then permitted to state, over objection (34a-37a, 52a), that the co-conspirator Carpenter then said, "No, there is $5,000 in each package," and that petitioner remained silent (36a, 52a).

Carpenter was not called by the Government as a part of its case in chief, but only as a rebuttal witness.

When he testified, Indictment 18,731, which named him as a co-conspirator, had not yet been dismissed. He was not asked regarding the amount of money in each package, but he testified that he saw no figures written on the band of paper that held each package together (Tr. 1064-1065).[2]

(ii) Another issue was whether, regardless of how much money was in the safe, it was the property of the decedent.

Petitioner's consistent position, reinforced by the statements of Carpenter, the decedent Hurst's confidential employee, was that the bulk of whatever was in the safe did not belong to the decedent Hurst (GX 4; 72a-73a, 78a, 87a, 97a, 111a).

Mrs. Roth, who admitted that she did not know who owned the money (48a), was permitted to state, over objection, that the decedent "used it for pleasures" (48a-49a).

The question of the ownership of the money developed subsidiary issues of fact:

(a) Was the sum of $2,000 paid Penn Paper & Stock Co. in payment of a debt owing by decedent (16a, 106a-107a)?

(b) Was the sum of $9,000 paid to one Rothman, an Internal Revenue agent who was dead at the time of the trial (112a), paid in respect of a bona fide debt owed to him by the decedent? (81a, 94a-97a, 111a-112a, 135a, 147a, 277a-278a).

(c) Were certain sums paid to others in consequence of informal legacies directed by the decedent? (16a, 72a-73a, 114a-115a, 121a, 136a, 144a).

2. "Tr." refers to the unprinted transcript of testimony.

(iii) A third basic issue under Count 1 concerned the proper valuation of the 1300 shares (155a-156a) of the stock of Dublin Hosiery Co.

That stock was returned at a valuation of $100 a share by petitioner as Hurst's executor (166a-167a, 172a), on the basis of a valuation obtained by him (177a). Its book value was shown to have been between $109 and $110 (215a-216a). However, a large block of this closely-held stock had been sold in July 1949, four months before decedent's death on November 7, 1949 (8a), at $66.67 a share (204a-209a), and the federal tax authorities accepted that figure in that transaction (209a-210a).

If the Dublin Hosiery stock had been properly valued at $66.67 a share, then, even if the amount of cash had been understated as alleged in Count 1, the total estate tax due would have been less than the $112,723.10 actually paid (23a, 103a) by petitioner (157a, 159a, 213a-214a, 219a), and on that basis, as the court charged the jury (254a-255a, 273a-276a), he would have been entitled to an acquittal on Count 1.

The evidence showed that the revenue agent handling the estate tax return now in question did not recommend assessment of a fraud penalty (117a).

(C) *The co-conspirator's evidence.* Before the conspiracy indictment was dismissed for lack of proof, Gurbarg, a revenue agent, was permitted to testify that Carpenter said, in petitioner's presence, that $30,000 had been in decedent's safe when it was opened, and that petitioner remained silent (64a-65a, 68a 69a, 90a-93a, 109a, 110a). This was in July and August 1952 (64a, 90a), a year and a half after the date of the offense charged in Count 1.

Before the conspiracy indictment was dismissed for lack of proof, another revenue agent, Boushee, was permitted to introduce an affidavit executed by Carpenter on April 29, 1955, more than four years after the date of the offense charged in Count 1, that there was $30,500 in the safe of the decedent Hurst at the time of his death (142a).

(D) *Facts bearing on Counts 2 and 3.* Count 2 (3a-4a) charged that petitioner delivered to delegates of the Secretary of the Treasury certain documents known by petitioner to be fraudulent and false, "said documents being memoranda purportedly signed by Winfred S. Hurst, deceased, concerning the ownership of cash found among the effects of said decedent at the time of his death, which documents were forgeries and well known to be forgeries by" petitioner. Count 3 (4a) alleged a similar delivery, but on another date, of knowingly fraudulent documents, including "photostatic copies of documents purportedly signed by Winfred S. Hurst, deceased, but well known by [petitioner] to be forgeries."

The issues thus raised, of forgery versus genuineness, covered a very large portion of the judge's charge to the jury, not only under his discussion of Counts 2 and 3 (281a-288a), but also in his discussion of the alleged forgeries themselves (266a-273a). As has been indicated, the jury found petitioner guilty on Counts 2 and 3 also (1a, 300a).

(E) *Proceedings in the court below.* On petitioner's appeal, timely taken (2a), he urged that (1) the admission of incompetent hearsay testimony vitiated the conviction on Count 1; that (2) dismissal of the conspiracy indictment at the close of the entire

case, which had been tried as one of conspiracy, necessarily deprived him of a fair trial on the substantive indictment; and that (3) Counts 2 and 3 of the indictment did not allege an offense, since Section 7207 of the Internal Revenue Code of 1954 is inapplicable to estate tax matters.[3]

The Government's brief, thereafter filed, states (p. 3):

> "It should be stated at the outset that the United States has, since the taking of the appeal, determined that it does not desire to take any position regarding the conviction on Counts 2 and 3. Accordingly it is agreeable to the United States that Counts 2 and 3 be dismissed or dropped from the case and the sentences thereon vacated." *Accord*, *id.* at p. 19.

In the face of this statement, petitioner argued in his reply brief (pp. 1-4), "The Government's concession that Counts II and III are invalid requires reversal because of the mass of testimony prejudicial to appellant admitted in proof of those counts at the trial."[4]

The court below rejected petitioner's evidentiary contentions (Appendix A, *infra* pp. A3-A7), and rejected likewise, in large measure because no objection thereto had been made at the trial, the petitioner's contention that the dismissal of the conspiracy indictment required a new trial on the substantive charges because testimony relating to the conspiracy prejudiced the bal-

3. The foregoing summary sets forth the headings of petitioner's brief in chief below.

4. This quotation sets forth the heading of the Point I of petitioner's reply brief below.

ance of the case. With respect to Counts 2 and 3 the court below simply said (*infra* p. A7):

> "Appellant next urges most strongly that the convictions on the second and third counts of the first indictment, charging submission of forged documents to the Internal Revenue Service, cannot stand because the statute upon which the indictment is founded does not cover the circumstances in evidence. As to these convictions the government says in its brief that it 'is agreeable that they be dismissed by the court and the sentence thereon vacated.' Accordingly, we shall direct that this be done thus relieving the appellant of the additional fines, aggregating $2,000, imposed under these counts."

REASONS FOR GRANTING THE WRIT.

The basic question presented is whether the Government may properly have the windfall of having the jury influenced against petitioner on one valid count by the use of evidence knowingly introduced under invalid counts, and then after convictions, abandon these invalid counts.

Petitioner does not ask this Court to reanvass the question of evidence decided adversely to him below, nor to review the circumstance that the presence of an indictment for conspiracy permitted introduction of matter which would have been inadmissible against him on the substantive indictment alone. Petitioner concentrates all of his attention on the use by the Government of invalid counts, necessarily known to have been invalid in the primary sense of not alleging offenses, as a vehicle for injecting prejudicial evidence in the trial of the only valid count in a very close case.

First. It is plain that the evidence which was introduced at the trial under cover of Counts 2 and 3—utterly abandoned on the appeal—seriously damaged petitioner's defense on the closely contested issues under Count 1.

Under Counts 2 and 3, the Government introduced a mass of evidence, including the testimony of handwriting experts, in support of the allegations contained therein that petitioner had delivered to Internal Revenue agents documents that "were forgeries and well known to be forgeries" (4a).

The issues thus raised, of forgery versus genuineness, were not simply incidental; they covered a very large portion of the charge to the jury, not only under

the judge's discussion of Counts 2 and 3 (281a-288a), but also in his discussion of the alleged forgeries themselves (266a-273a), because of course if the documents alleged in Counts 2 and 3 to have been forgeries were in fact genuine, then to that extent petitioner did not attempt to defeat and evade his decedent's estate tax as Count 1 alleged that he did.

The jury found peitioner guilty on Counts 2 and 3 (1a, 300a); put more bluntly, they found that he had submitted known forgeries to Internal Revenue officials. Necessarily this conclusion that petitioner was an evil person, carried over into their consideration of Count 1, where, as has been shown, the case was a close one, and where acquittal would have been required either in consequence of a finding that the money[5] found in the decedent's safe belonged to others or from a finding that petitioner had overvalued the block of closely-held Dublin Hosiery stock.

It is hardly necessary to cite authorities for the proposition that, if petitioner had been tried only on Count 1, the prosecution would not have been permitted to introduce evidence tending to establish that he had fobbed off known forgeries as genuine documents; proof of other offenses is always inadmissible. 1 Wigmore, *Evidence* (3d ed. 1940) §§ 192-194. Such evidence should be similarly inadmissible when, as here, the counts under which it could have been intro-

5. If decedent's girl friend, who counted the money in the safe over the weekends (38a) did not know to whom the money belonged (48a), the ordinary presumption that money in a decedent's safe belongs to his estate is swept away. And, surely, the money taken out of the safe and spent on "pleasures" (49a) is not evidence of the ownership of the money left in the safe—especially when the decedent's confidential employee, and witness for the government, told the Internal Revenue agents that the money in the safe did not belong to the decedent, but was for other persons (97a-111a).

duced are invalid, not because of defects in draftsmanship, but because they fail to allege any offense.

It is true that, even under Count 1 alone, evidence bearing on the genuineness or otherwise of the documents would have been admissible to the extent that it bore on the issue of the net amount of the decedent's estate. But, absent Counts 2 and 3, such evidence would have been received under a different accusation, in a different atmosphere, and under a wholly different charge to the jury.

Some trial errors are too glaring for curative action; some passages make too indelible an impression on a jury; for those a new trial is the only remedy. E.g., *United States v. Georga*, 210 F. 2d 45, 47 (C. A. 3); *Oliver v. United States*, 202 F. 2d 521 (C. A. 6). Here, where Counts 2 and 3 are abandoned on appeal pursuant to the Government's concession, but without any instruction to the jury to disregard the evidence thereunder, so that the prejudice is not even sought to be minimized, petitioner is not made whole as to Count 1 by the court of appeals' vacating the $2,000 fine imposed in respect of the invalid counts (*infra* p. A7).

Second. It is likewise plain that Counts 2 and 3 are invalid on their face.

Section 7207, I. R. C. 1954, simply carried forward § 3616(a), I. R. C. 1939. See H. R. Rep. No. 1337, 83d Cong., 2d sess., p. A425; Sen. Rep. No. 1622, 83d Cong., 2d sess., p. 603. This Court has held that § 3616(a), I. R. C., had been impliedly repealed in respect of income tax violations under § 145(b), I. R. C. 1939. *Achilli v. United States*, 353 U. S. 373. And the Government argued in *Achilli* that "A holding that Section 3616(a) reduces the penalties provided by Section

145(b) to those of a misdemeanor would be equally applicable to these various specific felony provisions [including the one making it a felony to attempt to defeat or evade the estate tax, § 894(b)(2)(C)]. It is inconceivable that Congress could have intended or anticipated so drastic a negation of the penalties provided in all these sections." Brief for the U. S., Nos. 430 and 834, Oct. T. 1956, pp. 27-28; *accord*, Memorandum for the U. S., No. 834, Oct. T. 1956, pp. 13-14.

Therefore, under the rationale of *Achilli v. United States*, 353 U. S. 373, Section 7207, I. R. C. 1954, the successor provision to what was there considered, had no application to estate tax offenses. It follows that Counts 2 and 3 were and are invalid on their face.

Third. Petitioner does not understand that the Government contests the proposition just advanced. But what renders the matter so shocking in the present case is that the Government was arguing in this Court the narrow scope of § 3616(a), I. R. C. 1939, at the very time that it was relying on the successor provision, § 7207, I. R. C. 1954, to convict petitioner at his trial in the present case.

Here is the chronology:

Mar. 21, 1957:[6] Government files Memorandum in *Achilli v. United States*, No. 834, Oct. T. 1956, in which it argues (pp. 13-14) "A holding that Section 3616(a) reduces the penalties provided by Section 145(b) to those of a misdemeanor would be equally applicable to these various specific felony provisions [including § 894(b)(2)(C), relating to

6. This date has been verified from the Docket in the Clerk's Office.

estate tax, cited in the paragraph preceding]. It is inconceivable that Congress could have intended or anticipated a negation of the penalties provided in all these provisions."

Mar. 25-Apr. 8, 1957: Petitioner tried and convicted for estate tax violations alleged under § 7207, I. R. C. 1954 (1a).

Apr. 26, 1957: Government files brief on merits in *Achilli v. United States,* Nos. 430 and 834, Oct. T. 1956, in which it repeats and amplifies its argument as to narrow scope of § 3616(a), I. R. C. 1939 (pp. 26-29, quoted in part, pp. 13-14, *supra*).

May 27, 1957: Opinion in *Achilli,* 353 U.S. 373, sustaining Government's views as to narrow scope of § 3616(a), I. R. C. 1939.

June 3, 1957: Petitioner files supplement to motion for acquittal, new trial, etc. (1a), alleging *inter alia* invalidity of Counts 2 and 3 laid under § 7207, I. R. C. 1954, and resultant prejudice to him on Count 1 (306a, quoted *supra*, p. 4).

July 25, 1957: Petitioner's motion for new trial, etc., denied (1a).

Sept. 19, 1957: Petitioner's motion for reconsideration filed (1a), and denied (2a); petitioner sentenced (2a).

Fourth. It is thus plain that, during and after the time that the Government was urging upon this Court the inapplicability of § 3616(a), I. R. C. 1939, to estate tax violations, it was prosecuting petitioner for an estate tax offense under the successor provision, § 7207,

I. R. C. 1954; it was defending against his motion for a new trial; and it was succeeding in having him sentenced for a violation of § 7207 in an estate tax matter.

The nub of this case is that the Government obtained a conviction on a close set of facts with the aid of evidence introduced under counts that, on the Government's contemporaneous contentions in this Court, and under this Court's decisions, did not state offenses. Having obtained the conviction, the invalid counts are abandoned—but the evidence introduced thereunder remains, and the conviction to which it so significantly contributed is affirmed.

Petitioner submits that this hit and run conduct on the part of the prosecution plainly deprived him of a fair trial, and involves such a departure from the accepted course of proceedings in criminal case as to call for an exercise of this Court's supervisory jurisdiction.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

June 1958.